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September 21, 2016

VIA ELECTRONIC DELIVERY

Members of the Planning Commission
San Luis Obispo County Planning Commission
976 Osos Street, Room 300
San Luis Obispo, CA 93408

Attention: Ramona Hedges, Planning Commission Secretary

Re: Phillips 66 Rail Spur Extension Project

Dear Commissioners:

On behalf of Phillips 66, we offer comments on the staff report for the continuation of your hearing on this matter on September 22, 2016.

Continuance

Phillips 66's request for a continuance was premised on the understanding that the Planning Commission desired more clarification regarding preemption in order to sort through the various conditions suggested by the Final EIR. The staff has now separated the proposed conditions into two groups. Exhibit B-1 to the staff report consists of conditions to which Phillips 66 did not object on preemption grounds, or which staff has revised to address preemption concerns. Exhibit B-2 is entitled "Conditions of Approval – County Preempted Due to Federal Law." If the Project is now being considered for approval with the Exhibit B-1 conditions only (and not the Exhibit B-2 conditions), then Phillips 66 agrees that continuance would serve little purpose.

In addition, on September 20, 2016, the Surface Transportation Board issued a decision denying the Valero Refining Company petition for a declaratory order and providing further guidance regarding preemption. As far as it goes, the guidance is consistent with Phillips 66's view of the Planning Commission's authority over the Rail Spur Extension Project. The guidance confirms that the Interstate Commerce Commission Termination Act (ICCTA) does not categorically preempt local land use authority over the facility of a company that is not a "rail carrier". Phillips 66 agrees in this case, having from the beginning subjected the Project to the County's review and approval. The guidance also

reiterates that any attempt to regulate Union Pacific's rail operations on its lines would be categorically preempted by ICCTA, and that other state and local regulation must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. Mitigation measures that unreasonably interfere with the rail carrier's ability to serve the facility would be preempted. Again, Phillips 66 agrees. Beyond mention of generally applicable electrical, plumbing and fire codes, the STB decision does not provide any insight into the specific conditions that Phillips 66 has identified as preempted. Again, at this point, Phillips 66 agrees that a continuance would serve little purpose.

Description of Three-Train-Per-Week Project

Page 2 of the staff report states that Phillips 66 has not provided detailed information requested by staff and the Planning Commission "regarding how the three train option would function." In my letter dated August 15, 2016, which is included as Exhibit F to the staff report, I point out that the EIR contains 38 pages of detail regarding the Project, all of which applies equally to the three-train-per-week Project, with the exception of portions of three pages, for which I provided hand-written corrections. (See Attachment B to my letter, which is designated pages 62-65 of 86 in the staff report.)

The staff report mentions "items such as the maximum number of trains that could arrive on a daily basis as well as other details relating to how the Project would function." Page 2-8 of the Final EIR explains: "The unloading facility would be designed around 'train slots' (a track that can contain an entire unit train)." The proposed facility would have two slots. *Id.* Page 2-10 of the Final EIR further explains: "The system has been designed to allow for up to two full trains to temporarily be on the Refinery Site at one time in case a second train arrives while the first is being unloaded." The physical design of the Project will not accommodate more than two unit trains at any time.

We are not aware of any other open questions regarding how the three-train-per-week Project would function; however Phillips 66 will certainly respond to any additional questions that we receive prior to or at the hearing.

Planning Commission Recommended Conditions from May 16, 2016

Pages 4-6 of the staff report include a table that presents staff's disposition of the conditions suggested by the Planning Commissioners.

1. Higher Berm: Phillips 66 does not object to the proposed change to Condition of Approval 16/Mitigation Measure AV-1a (a), which would raise the maximum height of the berm from 20 feet to 25 feet. The Final EIR concludes that a berm of this height would be sufficient to mitigate the aesthetic and visual impacts to less than significant. Even so, Phillips 66 would not object to a requirement of a berm

higher than 25 feet, provided the Planning Commission determines a higher berm would not create significant environmental impacts that have not been evaluated in the EIR.

2. Additional Visual Landscaping: The Final EIR concludes that revegetation with native grasses and shrubs would be sufficient to mitigate the aesthetic and visual impacts to less than significant. Even so, Phillips 66 would not object to a requirement for additional landscaping – either on the berm or elsewhere on the Refinery site – provided the Planning Commission determines such landscaping would not create significant environmental impacts that have not been evaluated in the EIR.

3. Dedicated On-site Tier 4 Locomotive: The staff report explains how requiring a dedicated on-site Tier 4 locomotive to handle the cars from unit trains might actually increase rather than decrease emissions. Phillips 66 has not had an opportunity to analyze the effect of this potential condition on emissions.

4. Nighttime Idling: The proposed edits to Condition of Approval 76/Mitigation Measure N-2a 1) and 2) go far beyond the Planning Commission's request to eliminate nighttime idling and switching, and impose limitations that are not warranted by the environmental review. This issue is addressed in greater detail below.

5. Coastal Access: Evidence in the record, including the EIR itself, supports a determination by the Planning Commission that coastal access is not appropriate at this location, based on the factors from the CZLUO. If the Planning Commission makes such a determination, proposed Condition 94 will not be relevant. See discussion of coastal access issues, below.

6. Bond to Cover On-Site Fire-Fighting Costs: Phillips 66 does not object to the use of the Memorandum of Understanding/Operating Plan required by MM-PS-3e as a mechanism to address onsite fire-fighting costs. If a bond is required, the company suggests that the condition specify an amount of $500,000.

Exhibit A – Findings for Approval

Page 1, Environmental Determination, paragraph A states that impacts were identified and mitigation measures were imposed for Population and Housing. We believe this is a typographical error. See Exhibit C to the staff report, pages 19-20 of 75, which finds that no mitigation measures are required because the impact is less than significant. This error can be corrected by simply striking the phrase "Population and Housing,".

Page 1, Conditional Use Permit, paragraph B states that "the primary existing use" of the Refinery site is "partial refinement of heavy crude". As the EIR explains, the refinery is designed to handle primarily heavy, sour crude oil, and is not capable of refining large quantities of light, sweet crudes. That said, in achieving the optimal crude blend for the Refinery, the heavy crudes are sometimes blended with smaller quantities of lighter, sweeter crudes. See Final EIR, page 2-34. This has been the case historically, and is expected to continue to be the case in the future. Of necessity, the Findings for Approval must distill a large amount of information. For this reason, Phillips 66 does not object to the description of the "primary existing use" because it does not appear intended to constrain the Refinery's practices. We simply wanted to clarify this point.

Regarding Page 2, Coastal Access, paragraph H, as noted above, evidence in the record supports a determination by the Planning Commission that coastal access is not appropriate at this location. If the Planning Commission makes such a determination, the finding in paragraph H will need to be revised. Alternative language for this finding is provided in the discussion of coastal access issues under the separate heading, below.

Exhibit B-1 – Conditions of Approval

The introductory language to Exhibit B-1 is unclear. The second paragraph refers to the "final section of this Exhibit". We believe this should refer to Exhibit B-2 instead. More importantly, the text is unclear regarding the relationship between the Exhibit B-1 and B-2 conditions. Exhibit B-1 states that "possible" preemption by federal law may prevent implementation of the Exhibit B-2 conditions outside the refinery boundary, but Exhibit B-1 does not explain the intention with respect to the Exhibit B-2 conditions. Based on page 4 of the staff report, we understand that the Exhibit B-2 conditions "are not included for consideration as conditions of approval". This should be made more clear in the second paragraph to Exhibit B-1.

Condition 21 (MM AV-3c): We reiterate our objection to requiring an evaluation of lighting and reductions in lighting at the existing Refinery. The existing refinery is in the baseline, it is not part of the Project, and the Final EIR does not identify any cumulative impacts related to the combined effects of lighting for the Project and the Refinery. Even more troubling, this condition would require reduction of any lighting that exceeds ***minimum*** federal or state safety standards. It is not the practice of Phillips 66 to provide a work environment meeting only the minimum safety requirements when, in the company's view, more precautions are warranted at a particular location. Worker safety should not be subordinated to aesthetics, particularly here, where the EIR identifies no adverse impacts associated with the lighting from the existing refinery.

Condition 22 (MM AQ-1a c.): Subsection c.1) requires that only "CARB Tier 4 certified diesel construction equipment off-road heavy-duty diesel engines" be used in construction. Phillips 66 has been unable to identify a contractor with an adequate fleet of Tier 4 equipment to construct the Project as described in the Project Description. As such, this mitigation measure is not feasible. CEQA requires only that a lead agency impose ***feasible*** mitigation. Phillips 66 will continue to reach out to construction firms to strive to meet the condition to the extent equipment is available. But we also request that the condition be amended to state that Tier 4 equipment is required, "if feasible". Note that Condition AQ-1d requires construction equipment greater than 100 bhp to employ CARB Level 3 diesel particulate filters of equivalent controls to achieve an 85 percent reduction in diesel particulate emissions, and Phillips 66 does not object to this level of control.

Conditions 26 (MM AQ-1e) and 31 (MM AQ-2a): These conditions require certain emission reductions or offsets to ensure that air emissions do not exceed SLOAPCD "thresholds". We understand these conditions to refer to the CEQA significance thresholds used in the Final EIR; however, that is not stated in the condition. It would be better to state the specific numeric threshold(s) in the condition. This would assist public understanding of the condition. It also would avoid confusion regarding the performance standard intended by the condition, in the event the Air District revises its CEQA thresholds in the future.

Condition 27 (MM AQ-1f): Section p requires a worker training program that includes specified safety measures related to Valley Fever. Phillips 66 does not object to the requirement for the program. However, the condition further specifies that safety measures must include: "1) Providing HEPA-filtered air-conditioned enclosed cabs on heavy equipment." Phillips 66 has not been able to identify a manufacturer or supplier who offers such equipment. Accordingly, this condition should be revised to specify that the equipment shall be provided "if feasible".

Condition 33 (MM AQ-4b): As proposed in the Final EIR, this condition required trucks hauling coke and sulfur from the Refinery to meet EPA 2010 model year standards for NOx and PM emission requirements. Two sentences were added to the recent version of this condition included in Exhibit B-1. First, the condition now also specifies that the annual average maximum number of trucks shall be limited to 49 trucks per day. The staff report explains that this was the assumption used as part of the cancer risk assessment in the Final EIR. Phillips 66 does not object to such a limit on trucks. Second, the condition now would prohibit delivery of crude oil to the Refinery by truck. The staff report states that this is needed because "the transportation of crude oil to or from the refinery by truck was not included in the cancer risk assessment." (See staff report, p. 6.) Phillips 66 objects to the prohibition on transportation of crude oil to the refinery by truck. Feedstock delivery by truck is a longstanding practice for the Refinery under certain circumstances. Moreover, the circumstances that prompt crude delivery by truck often coincide with lower processing rates, which reduces the number of sulfur and coke trucks. To ensure consistency with the

EIR cancer risk assessment while allowing continued crude delivery by truck, Phillips 66 suggests that the condition be revised as follows:

> All trucks under contract to the SMR for moving coke and sulfur or delivering feedstock, including crude oil, shall meet EPA 2010 model year NOx and PM emission requirements and a preference for the use of rail over trucks for the transportation of coke shall be implemented to the extent feasible in order to reduce offsite emissions. Trucking of coke and sulfur from the refinery and delivery of feedstock, including crude oil, to the refinery shall be limited to an annual average maximum of 49 trucks per day. ~~In addition, no crude oil shall be delivered to the refinery, or transported from the refinery by truck.~~ Annual truck trips associated with refinery operations and their associated model year and emissions shall be submitted to the SLOCAPCD annually.

Conditions 34 (AQ-4c): Condition 34 previously required that train unloading and switching activities be restricted to the hours of 7 a.m. to 7 p.m. unless exclusively Tier 4 engines were used in the locomotives. The condition was justified by the air quality analysis showing that the on-site emissions had greater impact in the nighttime hours when the air is usually still. Phillips 66 did not object to this restriction, but offered a minor edit to the introductory phrase. (See my letter of August 15, 2016, Exhibit E to the staff report, page 21 of 86.) Because of its tie to documented air quality impacts, we expected that the condition would become obsolete over time as Tier 4 engines penetrate deeply into the locomotive fleet, reducing air emissions and obviating the need for the limit on hours of operation. In its latest version, however, the limitation on hours of operation is absolute, and will not be lifted even if the locomotive fleet is 100% Tier 4 engines. In its new form, Condition 34 exceeds the authority of the Planning Commission. Even when implementing CEQA, conditions must meet the two federal constitutional tests: They must bear an "essential nexus" and "rough proportionality" to the impacts of the project. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring the permit authority to establish an "essential nexus" between permit conditions and a project's impact); and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring the permit authority to establish "rough proportionality"). Once the Project begins using exclusively Tier 4 locomotive engines, there is no longer an air quality justification for the limitation on hours of operation. We request that the connection between the hours of operation limitation and the use of Tier 4 engines be restored to the condition, as follows:

> If locomotives delivering crude oil to the Project are not exclusively locomotives with Tier 4 or better engines, crude oil train unloading and switching activities at the SMR shall be limited to the period of 7 a.m. to 7 p.m. to reduce the emissions during periods of calm meteorological conditions. Reports shall be submitted to the County and APCD indicating the time of arrival, the start and end time of train switching break-apart and

> unloading and departure time. These time limits do not apply to pull-in of the unit trains from the mainline. When a unit train is pulled in between 7 p.m. and 7 a.m., the locomotives shall shut down until the allowed unloading time starting at 7 a.m. No switching or breaking apart of trains or any other locomotive activity is allowed between 7 p.m. and 7 a.m. except for the minimum activity needed to move the unit train onto the SMR property.

Condition 35 (MM AQ-6/8): We appreciate that this condition has been revised to narrow its scope to the onsite GHG emissions. However, the condition retains a reference to "the entire project" that creates confusion. We suggest it be deleted. There also are two typos in the condition that need to be corrected. Finally, the condition previously required offsets to bring the GHG emissions to below the CEQA significance threshold. Now, the condition requires offsetting GHG emissions to zero. This is a departure from past practice, and cannot be justified by CEQA, which requires only that mitigation be included to reduce ***significant*** impacts. Accordingly, this appears to be an attempt to make up for the fact that requiring offsets for mainline rail emissions is preempted. Requiring such mitigation indirectly by altering the calculation methodology for offsetting onsite emissions is not appropriate. We suggest the following edits:

> **Prior to issuance of the Notice to Proceed**~~, Prior to issuance of the Notice to Proceed~~, the Applicant shall provide a GHG mitigation, monitoring and reporting plan for the onsite GHG emissions. The plan shall investigate methods to bring the onsite Rail Spur Project GHG emissions at the refinery ~~to zero for the entire project~~ to below the CEQA significance threshold of 10,000 metric tons of CO2e each year. The plan shall indicate that, on an annual basis, if after all onsite mitigations are implemented, the onsite GHG emissions from the Rail Spur Project still exceed ~~zero~~ the CEQA significance threshold, then SLOCAPCD-approved off-site mitigation will be required. Methods could include the contracting arrangement that increases the use of more efficient locomotives, or through other, ~~onsite~~ off-site measures. Coordination with SLOCAPCD should begin at least six (6) months prior to issuance of operational permits for the Project to allow time for refining calculations and for the SLOCAPCD review and approve the mitigation approach.

Condition 73 (MM HM-2a): This condition was updated to remove the requirement for Option 1 tank cars and instead require the use of DOT 117 tank cars. To be accurate, the condition should refer to rail cars designed to "DOT 117, 117P or 117R". In addition, as explained in Phillips 66's letter of April 14, 2016, the Federal Railroad Administration and the federal Pipeline and Hazardous Materials Safety Administration are awaiting further study on the safety of EPC brakes. Until the requirement for EPC brakes is enforced by

those federal agencies, it should not be required by County-imposed conditions. Accordingly, we request that Condition 73 be revised as follows:

> Only rail cars designed to meet DOT 117, 117P or 117R standards set forth in 49 CFR § 179.202 (as published May 8, 2015 at 80 Fed. Reg. 26644) shall be allowed to unload crude oil at the Santa Maria Refinery; except that ECP brakes shall not be required prior to the compliance date for such equipment as enforced by the Federal Railroad Administration and the federal Pipeline and Hazardous Materials Safety Administration.

Condition 76 (MM N-2a): To control nighttime noise, this condition previously restricted switching and idling to no more than 100 minutes between the hours of 10 p.m. to 7 a.m., and prohibited train repairs between 7:00 p.m. and 7 a.m. The staff report advised the Planning Commission that this condition was modified for "elimination of all locomotive idling during nighttime hours" (staff report, p. 4), but in fact the changes do much more than that. To accomplish the change suggested by the Commission, staff should have simply stricken the 100 minute allowance for switching and idling. Instead, staff's revised version has done the following: (1) Eliminated the 100 minute allowance for switching and idling between 10 p.m. and 7 a.m.; (2) Prohibited all switching and idling between 7 p.m. and 10 p.m. as well; (3) Prohibited ***unloading*** for rail cars between 7 p.m. and 7 a.m., and (4) Extended the limitations to the entire Project site, rather than only to the activities east of the unloading rack. It appears that all rail car unloading would have to be suspended at 7 p.m. even if unloading had commenced before that time and continuation would not require movement of rail cars. There is simply no environmental justification in the EIR for these changes, no mention of them in the staff report, and no analysis of the effect this would have on the many assumptions underlying the EIR analysis, such as the number of hours required to unload a train. We request that the hours restrictions be returned to their original form, but with the elimination of the 100 minute allowance, which was the only portion of the revision requested by the Planning Commission. Accordingly, we request Condition 76 be revised as follows:

> MM N-2a - Prior to issuance of the Notice to Proceed, the Applicant shall develop for review and approved by the County Department of Building and Planning a Rail Unloading and Management Plan that addresses procedures to minimize noise levels at the rail spur, including but not limited to the following: 1) east of the unloading rack area, oil train ~~unloading~~ idling and switching activities at the SMR shall be limited to the period of 7 a.m. to ~~7 p.m~~. 10 p.m.; 2) when a unit train is pulled in between ~~7 p.m.~~ 10 p.m. and 7 a.m., the locomotives shall shut down until the allowed unloading time starting at 7 a.m. No switching or breaking apart of trains or any other locomotive activity is allowed between ~~7 p.m.~~ 10 p.m. and 7 a.m. except for the minimum activity needed to move the unit train onto the SMR property.; 3) no horns, annunciators or other signaling devices shall be

> allowed onsite unless it is an emergency. If horns and annunciators are needed onsite for worker safety, then warning devices shall be developed, to CPUC standards, to alert the safety of plant personnel when trains are in motion without an audible warning device.; 4) Any trains repairs shall be conducted only between the hours of 7 A.M. and 7 P.M.

We reiterate that horns, annunciators and other signaling devices are federally required safety equipment, and the conditions regulating their use are subject to preemption. The County has not made any showing that would overcome the preemptive effect of federal law.

Condition 94: This new condition relates to docent-led pedestrian tours. As described further below under the Coastal Access heading, evidence in the record supports a determination by the Planning Commission that coastal access is not appropriate at this location. If the Planning Commission makes such a determination, proposed Condition 94 will not be relevant.

Exhibit B-2 – Conditions of Approval – County Preempted Due to Federal Law

We suggest that Exhibit B-2 include an introductory sentence that explains, consistent with page 4 of the staff report, that the Exhibit B-2 conditions are not included for consideration as conditions of approval.

Exhibit C – CEQA Findings – Sections 1 through 3

Section 2.1.4, Operations, p. 6: The top two paragraphs state that crude would be delivered in CPC-1232 tank cars. Based on Phillips 66's letter of April 14, 2016 and proposed Condition 73 (MM HM-2a), this should be updated to reflect the use of DOT 117, 117P or 117R tank cars.

Section 3.3, The Record, pp. 8-9: The list of materials comprising the Record of Proceedings should include application and supporting information submitted by Phillips 66, and the information submitted by the company in response to Planning Department information requests.

Condition 97 requires Phillips 66 to enter into an agreement to defend and indemnify the County in the event that the EIR and project approval are challenged by a third party. The CEQA Findings are required by CEQA, and the quality and completeness of the Findings will affect Phillips 66's ability to meet its obligations under Condition 97. We suggest that the Planning Commission add three additional findings to Exhibit C, Section 3.

Custodian of Records: CEQA requires that the findings specify the location and custodian of the record of proceedings. (See Pub. Res. Code § 21081.6(a)(2).) To satisfy this requirement, we suggest that the following be added at the conclusion of Section 3.3:

> The location and custodian of the documents and materials that comprise the record is:
>
> San Luis Obispo County
> Department of Planning and Building
> 976 Osos Street, Room 200
> San Luis Obispo, CA 93408

The Findings Are a Summary Document: Of necessity, the Findings summarize the information relied upon by the Planning Commission, but do not repeat the entirety of the EIR, comments received or other material in the record. We suggest the following finding be included at the conclusion of Section 3.3 to indicate that the Commission is basing its decision on the entirety of the record, not just the items summarized in the findings:

> The County has relied on all of the documents listed above in reaching its decisions on the proposed Project even if not every document was formally presented to the Planning Commission or County Staff as part of the County files generated in connection with the Project. Without exception, any documents set forth above not found in the Project files fall into one of two categories. Some of them reflect prior planning or legislative decisions of which the Planning Commission was aware in approving the Project. (See *City of Santa Cruz v. Local Agency Formation Commission* (1978) 76 Cal.App.3d 381, 391-391; *Dominey v. Department of Personnel Administration* (1988) 205 Cal.App.3d 729, 738, fn. 6.) Other documents influenced the expert advice provided to County Staff or consultants, who then provided advice to the Planning Commission. For that reason, such documents form part of the underlying factual basis for the County's decisions relating to approval of the Project. (See Pub. Res. Code, § 21167.6 (e)(10); *Browning-Ferris Industries v. City Council of City of San Jose* (1986) 181 Cal.App.3d 852, 866; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 153, 155.) These findings cite specific pieces of evidence, but none of the Commission's findings are based solely on those pieces of evidence. These project approval and the findings are based upon the entire record, and the Commission intends to rely upon all supporting evidence in the record for each of its findings.

Planning Commission Reliance on Experts: The EIR includes substantial information prepared by scientists expert in their respective fields, and agency and public comments at times include expert opinion as well. CEQA decisions confirm that when an EIR has been prepared, the lead agency may weigh all expert opinion and evidence, may accept the opinions and conclusions of its retained experts, even though others may disagree. To document the Planning Commission's decision to rely on the expert opinion presented in the EIR, and the expertise of the County's CEQA consultants, and the experts who prepared the technical appendices, we suggest the following condition be added at the end of Section 3:

> 3.5 Differences of Opinion Regarding Environmental Analysis
>
> In making its determination to certify the Final EIR and to approve the project, the Commission recognizes that the project involves controversial environmental issues and that a range of technical and scientific opinion exists with respect to those issues. The Commission has acquired an understanding of the range of this technical and scientific opinion by its review of the Revised Draft EIR, the comments received on the Revised Draft EIR and the Final EIR, including the responses to public comments, as well as other testimony, letters, and reports submitted for the record. The Commission recognizes that some of the comments submitted on the EIR and at the hearing disagree with the conclusions, analyses, methodology and factual bases stated in the EIR. The Commission has reviewed and considered, as a whole, the evidence and analysis presented in the EIR and in the record, and has gained a comprehensive and well-rounded understanding of the environmental issues presented by the Project. In turn, this understanding has enabled the Commission to make its decisions after weighing and considering the various viewpoints on these important issues. In adopting these findings and approving the Project, the Commission relies predominantly on the expertise of the consultants retained by the County, while recognizing that the evidence and opinions others submitted through the public comment process have also contributed to the final analysis and conditions of approval.

Exhibit C – CEQA Findings – Section 4 – Statement of Overriding Considerations

As noted above, Condition 97 requires Phillips 66 to defend and indemnify the County against third party challenges to the EIR and project approval. Where significant environmental impacts will remain even after incorporation of feasible mitigation, CEQA requires that the lead agency adopt a statement of overriding considerations. Thus, a complete statement of overriding considerations will enhance Phillips 66's ability to meet its obligations under Condition 97. There is no limit to the number of overriding considerations, and it is prudent for a lead agency to list all the overriding considerations

that underlie its decision to approve the project notwithstanding its impacts, and for which there is substantial evidence. Where the statement of overriding considerations lists more than one factor, the agency often includes a statement that any single factor is sufficient to support its decision. If this statement is included, a reviewing court will uphold the statement of overriding considerations if it finds substantial evidence supports any one of the considerations. (See *Citizens for Ceres v. City of Ceres* (filed September 12, 2016) Fifth Appellate District, Case No. F070988.) Therefore, we recommend that the following be added to the end of Section 4:

> The above benefits and considerations outweigh the significant and unavoidable adverse environmental impacts, and such benefits override, outweigh, and make "acceptable" any remaining environmental impacts of the project (CEQA Guidelines Section 15092(b)). All of these benefits and considerations are based on the facts set forth in the findings, the Final EIR, and the record of proceedings for the Project. Each of these benefits and considerations is a separate and independent basis that justifies approval of the Project, so that if a court were to set aside the determination that any particular benefit or consideration will occur and justifies Project approval, this Planning Commission determines that it would stand by its determination that the remaining benefit(s) or consideration(s) is or are sufficient to warrant Project approval.

Staff requested that Phillips 66 prepare a draft statement of overriding considerations. In preparing the draft, we reviewed the deliberations of the Planning Commission to attempt to discern the factors that underlie the tentative positions voiced by the commissioners on May 16, 2016. Based on that review, our draft statement of overriding considerations included two additional factors. First, we cited the reduction in cancer risk associated near the Refinery, which is due in large measure to Condition of Approval 33/MM AQ-4b, requiring cleaner engines in the ***existing*** truck traffic servicing the Refinery. Second, we cited the comparison to the No Project Alternative, based on the EIR's analysis that this may well entail increased delivery of crude by trains unloading at a terminal in the San Joaquin Valley and trucking of the crude to the Santa Maria Pump Station. If these are indeed factors underlying the decision of the commissioners, we suggest that the Planning Commission expand Exhibit C, Section 4 by adding the discussion of these factors found in our letter of August 15, 2016, Exhibit F to the staff report, pages 82-86.

Exhibit C – CEQA Findings – Section 5 – Federal Preemption

CEQA requires incorporation of mitigation to reduce impacts to less than significant, unless specific economic, legal, social, technological or other considerations make mitigation infeasible. Section 5 of the Findings documents that some of the mitigation measures originally identified in the Final EIR are legally infeasible and cannot be required

because they are preempted by federal law. Section 5 identifies one such law, the Interstate Commerce Commission Termination Act. We suggest two changes to Section 5.

First, Section 5 should state that the measures listed in Exhibit B-2 are preempted by the federal laws discussed in Section 5. Such a statement linking the discussion of preemption to the Exhibit B-2 conditions will improve the CEQA Findings by clearly identifying which conditions from the Final EIR are considered legally infeasible due to federal preemption.

Second, Section 5 should be expanded to include additional federal laws that preempt one or more mitigation measures as originally proposed, in addition to the ICCTA. Attachment A to my letter of August 15, 2016 (Exhibit F to the staff report) identifies each law relevant to each preempted mitigation measure. In some cases, a measure is preempted by more than one federal law. We suggest that you amend Section 5 by adding a finding that the mitigation measures relating to mainline rail activities are further preempted as identified in Table 1, below.

TABLE 1

Final EIR Mitigation	Topic	Additional Preemptive Federal Law
AQ-2a	Require Tier 4 engines for locomotives.	Clean Air Act, 42 USC 7543
AQ-3	Require Tier 4 engines for locomotives.	Clean Air Act, 42 USC 7543
AQ-6	Require GHG offsets for mainline rail emissions.	Clean Air Act, 42 USC 7543
AQ-8	Require GHG offsets for mainline rail emissions.	Clean Air Act, 42 USC 7543
HM-2a	Specifies "Option 1" tank cars.	The Hazardous Materials Transportation Act, and PHMSA regulations specifying requirements for rail cars transporting crude oil. See 49 USC § 512549; and CFR Part 179, adopted May 8, 2015 (80 Fed. Reg. 26644), as confirmed by Congress in the FAST Act, § 7304.
HM-2b	Specifies routing requirements for crude oil shipments.	Federal Railroad Safety Act, and regulations adopted pursuant thereto by the Federal Railroad Administration to regulate routes of shipments of hazardous materials. See 49 USC 20106; and 49 CFR 172.820, 172.822.

HM-2c	Requires Positive Train Control be in place for all mainline rail routes in California that could be used for transporting crude to the Refinery.	Federal Rail Safety Act, as amended, establishing requirements and deadlines for implementation of Positive Train Control. See 49 USC § 20157, as amended by the Positive Train Control Enforcement and Implementation Act of 2015, Pub. Law 114-73, Sec. 1302. See also 49 USC § 20106.
PS-4a	Advanced notice of crude oil shipments.	49 CFR § 172.820(i)(2) and 49 CFR Parts 15 and 1520 dealing with sensitive security information.
PS-4b	Specifies "Option 1" tank cars.	See HM-2a, above.
TR-4	Requires unit trains to be scheduled so as to not interfere with passenger trains.	49 USC § 24308(c) establishes the priority between passenger trains and freight trains, using specified metrics and standards. See Passenger Rail Investment and Improvement Act, § 207.

Exhibit C – CEQA Findings – Sections 6 through 13

Section 11.2, Growth Inducing Impacts, p. 72: Under the heading "Economic Growth", this section states that construction is expected to last about four months. This should be corrected to be consistent with the applicant's information and page 2-20 of the Final EIR, which states that construction is expected to last 9-10 months.

Coastal Access

The Coastal Zone Land Use Ordinance, Section 23.04.420 (c), provides that coastal access is not required where access would be inconsistent with public safety, military security needs or the protection of fragile coastal resources. The EIR and other evidence in the record support a determination by the Planning Commission that coastal access is not required at the Refinery site because it would be inconsistent with public safety and the protection of fragile coastal resources.

Union Pacific Railroad (or an affiliate) owns the property underlying the railroad tracks that bisect Phillips 66's properties. The public has no right to cross the railroad tracks in the vicinity of the Phillips 66 Refinery, and Phillips 66 has no right to invite them to do so. Even more importantly, there is no safe public railroad crossing connecting the Phillips 66 parcels on the east and west sides of the railroad tracks. Trespass along and across the railroad tracks is a real safety hazard: The EIR documents that people in San Luis Obispo County have been killed or injured trespassing on the railroad tracks in nearly every year from 2003 to 2012.

With respect to fragile coastal resources, removal of even the highly degraded habitat that will be affected by the Project has been identified as a significant impact by the EIR. The areas that would be affected by coastal access are of much higher quality and value. The EIR confirms that fragile coastal resources would be affected by coastal access in two ways. First, for safety reasons, the public cannot share the route of the current access road with the trucks servicing and inspecting the water outfall; therefore, a new route would be required, and the footprint of any such path or road would eliminate sensitive habitat. Second, as described in the EIR, it can be difficult to confine the public to the designated path or road, risking the degradation or loss of additional habitat and sensitive and rare plants as people wander or carve their own short cuts.

Use of docent-led access can reduce some but not all of these hazards. The presence of a docent would likely reduce the incidence of visitors straying from the path. However, it will not avoid loss of habitat in the creation of the path itself. Most importantly, the County has not obtained a right of public access across the railroad track, and correspondence from Union Pacific demonstrates that the company will not voluntarily offer such access. Accordingly, there is no current, safe and legal railroad crossing, and there is unlikely to be one in the foreseeable future. A docent cannot change this.

The staff report, p. 3, seems to be based on the mistaken belief that the County can accept an offer of public access from Phillips 66 and then require Phillips 66 to (1) acquire a right of public access across the Union Pacific property and (2) build whatever facilities are necessary to ensure safe crossing of the railroad tracks. This assumption is fundamentally wrong. Under certain circumstances, the Coastal Act and the County's CZLUO require a property owner to dedicate public access ***across his own land***. But there is absolutely no basis in the Coastal Act or cases interpreting that law for the County to require the owner of one property to acquire a ***different*** property or property right for the sole purpose of dedicating it to public use. Similarly, there is no basis in the Coastal Act or cases interpreting that law for the County to require the owner of one property to ensure that access across a ***different*** owner's property is safe for public use.

Accordingly, Phillips 66 respectfully requests that the Planning Commission take the following actions:

1. Amend Exhibit A, Findings for Approval, by replacing Section H with the following:

   Public access across the Refinery Site is not required under Section 23.04.420 (c) of the Coastal Zone Land Use Ordinance because it would be inconsistent with public safety, and because it would be inconsistent with the need to protect fragile coastal resources. Each of these factors individually supports the finding of exemption.

2. Amend Exhibit B-1, Conditions of Approval by deleting Condition 94.

We look forward to responding to any additional questions that the Commission may have as the hearings resume on September 22, 2016.

Very truly yours,

ALSTON & BIRD LLP

Jocelyn Thompson

JNT:

cc: Ryan Hostetter (via Email)

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